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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-472

MAE SIMS, Guardian Ad Litem for CYNTHIA L. SIMS and BRENDA LEE SIMS, minors, and MAE SIMS and CHERYL MAE SIMS, individually,

Petitioners

vs.

STATE OF IDAHO; DEPARTMENT OF HIGHWAYS, a civil administrative department of the State of Idaho; C. ED FLANDRO, HOWARD B. THOMASON and LLOYD F. BARRON, Idaho Board of Highway Directors; CARIBOU COUNTY, State of Idaho; JACK GIBBS, IRA ELLIS and EDWIN M. SMITH, County Commissioners of Caribou County, State of Idaho,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

Respondents feel that the facts stated in the petition are adequate for the purpose and, therefore, respondents have no wish to enlarge upon them.

ARGUMENT

Petitioners concede that the question presented to this court for determination is not one of first impression. It was decided in the case of Great Northern Railroad Company v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932). The case has been recognized as a landmark decision with respect to the process of overruling established doctrines in the law. This court has reaffirmed the principle on a number of occasions, most recently in Linkletter v. Walker, 381 U.S. 618, 14 L. Ed. 2d. 601, 85 S. Ct. 1731 (1965); Adams v. Illinois, 405 U.S. 278, 31 L.Ed. 2d. 202, 92 S. Ct. 916 (1972); Jenkins v. Delaware, 395 U.S. 213, 23 L.Ed. 2d.

253, 89 S. Ct. 1677 (1971); and Johnson v. New Jersey, 384 U.S. 719 (1966). Inasmuch as these cases involved criminal matters and, therefore, a man's liberty, and in some his life, they would seem to be dealing with more compelling matters than those at stake in a tort action.

Be that as it may, it is clear that this court has frequently considered the question of retrospective as against prospective overruling of established doctrines and has concluded with Justice Cardozo in his opinion in the Sunburst case that "* * * The Federal Constitution has no voice upon the subject.".

A number of state courts have apparently arrived at the same conclusion in

comparatively recent decisions. See List v. O'Connor, 19 Ill.2d. 337, 167 N.E. 2d. 188 (1960); Perry v. Mt. Zion Community Unit School Dist., 30 Ill. App.2d. 307, 174 N.E. 2d. 701 (1961); Holytz v. Milwaukee, 17 Wisc. 2d. 26, 115 N.W. 2d. 618 (1962); Marshall v. Green Bay, 18 Wisc. 2d. 496, 118 N.W. 2d. 715 (1963); Hennington v. Valuch, 19 Wisc. 2d. 260, 120 N.W. 2d. 44 (1963); Balts v. Balts, 273 Minn. 419, 142 N.W. 2d. 66 (1966); Spanel v. Mound View School Dist. 621, 264 Minn. 279, 118 N.W. 2d. 705 (1962); In re Jeruzal, 269 Minn. 183, 130 N.W. 2d. 473 (1964). In another case, Molitor v. Kaneland Community Dist. No. 302, 18 Ill. 2d. 11, 163 N.E. 2d. 89, 86 ALR 2d. 469, Cert. den., 352 U.S. 968, 4 L.Ed. 900,

80 S. Ct. 955 (1959), the plaintiffs sought to have this court review the question of constitutionality of prospective overruling without success.

The Illinois court in this case quite carefully analyzed the reasons for its conclusions on this issue:

> "In here departing from stare decisis because we believe justice and policy require such departure, we are nonetheless cognizant of the fact that retrospective application of our decision may result in great hardship to school districts which have relied on prior decisions upholding the doctrine of tort immunity of school districts. For this reason we feel justice will best be served by holding that, except as to the plaintiff in the instant case, the rule herein established shall apply only to cases arising out of future occurrences. This result is in accord with a substantial line of authority embodying the theory that an overruling decision should be given only prospective operation whenever injustice or hardship due to reliance on the overruled

"decisions would thereby be averted. (Citations omitted).

"Likewise there is substantial authority in support of our position that the new rule shall apply to the instant case. (Citations omitted). At least two compelling reasons exist for applying the new rule to the instant case while otherwise limiting its application to cases arising in the future. First, if we were to merely announce the new rule without applying it here, such announcement would amount to mere dictum. Second, and more important, to refuse to apply the new rule here would deprive appellant of any benefit from his effort and expense in challenging the old rule which we now declare erroneous. Thus there would be no incentive to appeal the upholding of precedent since appellant could not in any event benefit from a reversal invalidating it.

"(3) It is within our inherent power as the highest court of this state to give a decision prospective or retrospective application without offending constitutional principles. Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S. Ct. 145, 77 L.Ed. 360."

One of the members of the Illinois

court, Mr. Justice Walter E. Shaefer, has had occasion to examine the matter of prospective as compared to retrospective overruling of legal doctrines.[1]

We call attention to this article, particularly because the basis of petitioners' argument is that they were denied equal rights with the plaintiffs involved in the case of State v. Smith, 93 Idaho 795, 473 P.2d. 937 (1970). In other words, they are saying that the law was not universally applied to all who came within the scope of its operation. With respect to this principle, Justice

[1] W. Schaefer, The Control of "Sunbursts"; Techniques of Prospective Overruling, Twenty-fourth Annual Benjamin N. Cardozo Lecture, 1967, reprinted in 42 N.Y.U.L. Rev. 637 (1967)

Shaefer says:

> "Any change in legal doctrine, interferes with the uniform operation of the law. But as Wigmore pointed out: 'Equality is something desired for the persons now under the law; it does not call for sameness of treatment between those of the present and those of the past or the future generation. Gompers need not receive equal law with Hampden or with the citizens of Utopia, provided he receives equal law with Harriman.' Equality is desired for those who are similarly situated. <u>But the person who successfully challenges existing legal doctrine can be, and has been, regarded as having thereby set himself apart</u>.
>
> "More frequently than not the strong equities that are required to persuade a court to overrule an earlier decision have enough vigor to carry all the way, so that reliance is totally disregarded and the overruling is fully retroactive. Contrasted with this alternative, the degree of disturbance of equality that is involved in the new technique has not seemed too serious. It has appealed to many state courts as a permissible way to limit the extent to which reliance is frustrated without making the court's determination

"an academic exercise; the Supreme Court of the United States has also used this technique. As Professor David Currie has said, the 'argument may be a bit intellectually untidy, but it may offer the best alternative to judicial paralysis on the one hand, and whole frustration of legitimate expectations on the other.'"[2] (Emphasis added)

Later the writer reinforces the basis of the opinion of the Wisconsin court in Molitor as well as that of the Idaho court in Smith when he says:

"Reliance takes many forms, ranging from the clear case of the contract entered into in specific reliance upon a particular decision, to tort situations in which reliance has been found in the actual or assumed failure of a defendant to insure against the newly created risk, or to investigate the accident at the time it occurred."[3]

The conclusion of all these authorities is that the parties involved in the case

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[2] Ibid, et seq. 638
[3] Ibid, et seq. 643

wherein an established doctrine is overruled are apart from all other persons. They are the ones who took the risk involved in changing a principle of law and for that they should be rewarded. Not being in the same category, the other persons are deprived of nothing when they do not receive the same treatment. For that reason there is no denial of equal protection of the law under the Fourteenth Amendment or any other constitutional provision.

Petitioners make the statement that "It is a cardinal rule that equal protection of the law in its constitutional sense implies that all litigants similarly situated may appeal to the courts for relief, under like conditions and without discrimination."

and cite the case of Republic Pictures Corporation v. Koppler, (CCA 8) 151 F.2d. 554, Aff'g 59 Fed. Supp. 112. Aff'd 327 U.S. 757, 66 S. Ct. 523, 327 L.Ed. 757, and Swick v. Glenn Martin Co., 68 Fed. Supp. 863, 869.

These two cases involve situations where the state attempted to establish different limitation periods for actions brought under federal law than under state law, and the courts held, quite understandably, that there was a denial of equal protection. This was a permanent classification of litigants in which those seeking relief under a federal statute were treated differently from those seeking virtually the same relief under a state statute. The difference in the case at bar is that

an established doctrine of law was abrogated and the effect of such abrogation was postponed to a determinable date in the future. Those involved in the case were permitted to pursue their remedy for two reasons: (1) So that the new rule announced would not be mere dictum; and, (2) That the plaintiffs might receive some compensation for their efforts in bringing the suit and overturning an existing rule of law.

CONCLUSION

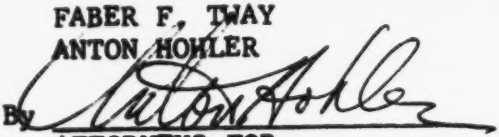
The petitioners here did not stand in the same circumstances as the plaintiffs in the case of Smith v. State and there is no denial of equal protection under the Constitution of the United States of America. For

this reason petitioners' petition for a writ of certiorari should be denied.

Dated this 10th day of October, 1972.

Respectfully submitted

FABER F. TWAY
ANTON HOHLER

By 

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CERTIFICATE OF MAILING

I hereby certify that on the 11th day of October, 1972, I mailed a true and correct copy of the within and foregoing brief in opposition to petition for writ of certiorari to:

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by depositing a copy thereof in the United States mail with postage prepaid thereon.

Anton Hohler

Anton Hohler